

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHNNIE L. WALKER

Claimant

VS.

UPS FREIGHT

Self-Insured Respondent

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Docket No. 1,030,832

ORDER

Respondent appealed the January 29, 2008, Preliminary Decision and the February 28, 2008, Supplemental Order on Motion Hearing, both entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

This is a claim for a July 31, 2006, accident. A brief mention of an earlier preliminary hearing order and its appeal to the Board is helpful in understanding the issues presented in this appeal.

Following an August 16, 2007, preliminary hearing, Judge Foerschler granted claimant temporary total disability benefits. Respondent appealed the August 20, 2007, Preliminary Decision to the Board. In that appeal, respondent did not challenge that claimant injured his low back in the July 2006 accident. But respondent did challenge that claimant injured his hips in that accident and that the Judge awarded claimant temporary total disability benefits for that injury.

Because there was a question whether the Board had the jurisdiction and authority to review the August 20, 2007, Preliminary Decision, the Board remanded the claim to the Judge for further findings. In short, the Board needed to know whether the Judge awarded claimant temporary total disability benefits for his alleged low back injury or for his alleged bilateral hip injuries. The Board's Order stated, in part:

It is not readily apparent from the August 20, 2007, Preliminary Decision whether the Board has jurisdiction at this juncture to review that decision. Accordingly, this claim should be remanded to the Judge for further proceedings and findings that set forth whether the award of temporary total disability benefits

is based upon the low back injury or hip injury. In the event the award is based upon the latter, the Judge should address the issue of whether the hip condition is somehow related to the July 2006 accident.¹

Furthermore, in the earlier appeal the record was not clear whether the issues surrounding claimant's hips had been fully addressed as that issue was only mentioned in respondent's attorney's opening comments at the August 2007 preliminary hearing and in Dr. Terrence Pratt's July 24, 2007, medical report, which claimant's attorney received one or two days before the August 16, 2007, hearing. Accordingly, the Board left the door open for the Judge on remand to conduct any further proceedings he deemed warranted.

Following the remand, the parties did not request to present additional evidence regarding claimant's hips. And the Judge did not make the additional findings that were requested in the Board's November 9, 2007, Order. Claimant, however, requested penalties for respondent's failure to timely pay the temporary total disability benefits that the Judge had ordered in the August 20, 2007, Preliminary Decision.

That brings us to the present appeal. On January 17, 2008, the parties appeared before Judge Foerschler to address claimant's request for penalties. Following that hearing, the Judge entered the January 29, 2008, Preliminary Decision in which the Judge failed to address the penalties issue but, instead, ordered the continuation of temporary total disability benefits. Somewhat confused, the parties' attorneys wrote the Judge on February 4, 2008, requesting him to clarify or revise the January 29, 2008, Preliminary Decision. The letter, which the Division of Workers Compensation received on February 6, 2008, stated:

We are in receipt of your January 29, 2008 Preliminary Decision in the above captioned claim. *We are confused by the Order, however, since the purpose of the hearing held on January 17, 2008 was only with respect to claimant's Application for Penalties.* Your decision states that a Preliminary Hearing was held on claimant's request for temporary total disability benefits, which was not the case. Furthermore, your decision references a pending appeal before the board, which is also not the case.

Accordingly, we respectfully request you clarify or revise your January 29, 2008 Preliminary Decision to reflect a decision only on the issue presented to the Court on January 17, 2008. Please do not hesitate to contact us if you have any questions or concerns. Thank you in advance for your professional courtesy and cooperation in this matter. (Emphasis added.)

¹ *Walker v. UPS Freight*, No. 1,030,832, 2007 WL 4296026 (Kan. WCAB Nov. 9, 2007).

On February 6, 2008, respondent forwarded its application for review of the January 29, 2008, Preliminary Decision to the Division of Workers Compensation.

Without mentioning the parties' February 4, 2008, letter requesting clarification, the Judge entered the February 28, 2008, Supplemental Order on Motion Hearing in which the Judge approved additional medical treatment by Dr. Pratt and continuing temporary total disability benefits. Moreover, the Judge ruled claimant's application for penalties was premature. Respondent appealed the February 28, 2008, Supplemental Order to the Board.

Based upon the above, both the January 29, 2008, Preliminary Decision and the February 28, 2008, Supplemental Order on Motion Hearing are now before the Board and both orders will be addressed in this appeal.

Respondent contends the Judge erred by addressing claimant's entitlement to temporary total disability benefits and medical treatment as part of claimant's request for penalties. Respondent argues, in essence, there has been a denial of due process as it did not have notice those issues were going to be addressed at the January 2008 hearing. Likewise, respondent argues it was denied its right to present evidence and address those issues. Respondent also argues the Judge lacked the jurisdiction to award claimant those benefits as claimant had been released to return to work without restrictions. Regarding claimant's request for penalties, respondent argues claimant failed to comply with the notice requirements of the penalties statute and, therefore, claimant is not entitled to such an award. In summary, respondent requests the Board to reverse both the January 29, 2008, and the February 28, 2008, orders.

Conversely, claimant argues the merits of his claim for temporary total disability benefits and requests the Board to affirm the orders.

The issue before the Board on this appeal is whether the Judge erred by addressing claimant's entitlement to medical treatment and temporary total disability benefits in a penalties proceeding without affording respondent the opportunity to present evidence on those issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

First, the Board notes that its November 9, 2007, Order, which remanded this claim to the Judge for further findings, has not been acted upon. Accordingly, the parties have not taken the opportunity to address further the issue of whether claimant's hip problems are related to his July 31, 2006, accident. Therefore, the August 20, 2007, Preliminary

Decision rendered by Judge Foerschler remains in effect. And that order provided “temporary total disability for claimant is ordered resumed as of June 4, 2007, the date of application and continued until a full release is provided by Dr. Pratt.”²

Claimant’s request for penalties is premised upon the August 20, 2007, Preliminary Decision, and the propriety of that decision remains in dispute. Accordingly, the Board suggests the parties formally request the Judge to address the Board’s November 9, 2007, order for remand. Should the parties then dispute the Judge’s additional findings and believe the Board has jurisdiction to review those findings, the parties could then request Board review.

Second, the Board agrees with respondent that the January 17, 2008, hearing dealt only with claimant’s request for penalties. Accordingly, the Judge exceeded his authority in addressing the merits of claimant’s entitlement to preliminary hearing benefits without affording the parties appropriate notice and an opportunity to present evidence on those issues. In short, there was a denial of the fundamental right of due process. In addition, the Workers Compensation Act provides that parties shall be given a “reasonable opportunity to be heard and to present evidence.”³ The Board finds the January 29, 2008, and February 28, 2008, orders were entered without appropriate notice to the parties that the Judge was going to consider matters other than the penalties issue. Consequently, both orders should be set aside.

The parties have argued the merits of claimant’s entitlement to both medical treatment and temporary total disability benefits. Those arguments are not pertinent to the present appeal and, therefore, they do not warrant discussion in this appeal.

Based upon the above, the Board concludes the August 20, 2007, Preliminary Decision remains in effect; the Board’s November 9, 2007, order for remand remains unsatisfied; and the January 29, 2008, and February 28, 2008, orders are set aside.

WHEREFORE, the Board sets aside the January 29, 2008, Preliminary Decision and the February 28, 2008, Supplemental Order on Motion Hearing. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

² ALJ Preliminary Decision (Aug. 20, 2007) at 2.

³ K.S.A. 2006 Supp. 44-523(a).

Dated this ____ day of May, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
 Jeff S. Bloskey, Attorney for Respondent
 Robert H. Foerschler, Administrative Law Judge